Supreme Court, U.S.
FILED

CASE NO. 03-14128-CC 4 96 MAY 24 2004

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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN EDWARD CORBETT

Petitioner,

Vs.

DONALD H. RUMSFELD

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Eleventh Circuit Court of Appeals erred when it refused a request by the plaintiff to receive a signed judgment order/opinion to go forward to the Supreme Court with an appeal.

(2) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff's retaliation claim was untimely.

(3) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the EEOC never found that the Army discriminated against the plaintiff.

(4) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff has failed to present evidence raising a genuine issue of material fact as to whether Rumsfeld's proffered reasons for removing him from his position were pretextual.

(5) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff failed to cite any authority holding that the failure to properly process an EEOC claim is actionable under Title VII.

(6) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff waived his claim that the District Court erred in its determination that he was not subject to 5 U.S.C.§ 7121(d).

(7) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that any error in failing to provide the plaintiff with a true and correct transcript of the hearing on Rumsfeld's motions to dismiss or for summary judgment was harmless.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion (App. 6-9), rehearing denial (App. 2) ,judgment entered (App. 1) and issued as a mandate (App. 1) of the United States Court of Appeals for the Eleventh Circuit are enclosed. The memorandum and order (App. 12-38) of United States District Court for the Northern District of Alabama are also enclosed. Orders from the Equal Employment Opportunity Commission are also enclosed. (App. 39-62)

JURISDICTION

(1) The date the judgment and order sought to be reviewed was on February 27, 2004. (App. 6-9)

(2) The Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 in that this is an appeal from a final decision of the United States District Court of Appeals (Eleventh Circuit).

(3) The Court has jurisdiction of this appeal according to Article III, Section 1, Section 2(1), 2(2) and Amendments 5 and 14 of the United States Constitution.

(4) The Court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964.

(5) The complaint was derived from a federal question. This case is brought before the Court because the questions raised by the plaintiff have been previously decided by this Court. The plaintiff raised federal questions to the Eleventh Circuit Court of Appeals from a complaint filed in District Court. The leading question before the Court is whether the

Eleventh Circuit Court of Appeals should have an obligation to render a signed judgment order/opinion to the plaintiff in order to successfully appeal to the Supreme Court.

The plaintiff requested a signed judgment order/opinion and the request was denied. (App. 4-5).This case deals with the role of federal courts in regards to enforcing decisions determined by the Equal Employment Opportunity Commission. The questions raised in the petition deals with the timeliness of filing federal EEO complaints and the decisions by EEOC in regards to federal agencies that are bound by federal courts. The Supreme Court has upheld the decisions by EEOC in regards to timeliness of federal complaints and EEOC decisions that are bound by the federal courts. In EEOC Appeal No. 01983071, January 19, 2001 decision, EEOC states that the plaintiff 's entire complaint was timely appealed with respect to all issues raised in the complaint. (App. 39-42) The District Court dismissed the plaintiff's claims that he did not timely raise his removal claim .(App. 23).The District Court dismissed the plaintiff's claim that he did not timely raise his retaliation claim. (App. 28).The Eleventh Circuit Court of Appeals affirmed the District Court's decision that the plaintiff's retaliation claim was untimely. (App. 9) EEOC also decided that the plaintiff was not subject to 5 U.S.C. § 7121(d) and the federal agency in question misapplied establish law in removing the plaintiff from his job. (App. 43). The Eleventh Circuit Court of Appeals has decided that the plaintiff failed to raise this claim at the District Court level. (App. 8) The question that addresses this issue was raised at the summary judgment hearing in District Court and the plaintiff's comments concerning this issue were taken out of the transcript. The court reporter did not sign the transcript to certify that it was true and correct. (App. 10-11) The question is whether the District Court had an obligation to produce a transcript that was true and correct. The Supreme Court has decided that any violation ascertained by the course of a reasonable investigation of the charging party's

complaint is actionable. These questions were timely raised before the lower courts and this Court should have jurisdiction to review on a writ of certiorari. This case is brought to this Court on the claim that the plaintiff was a federal employee and his appeal is pursuant to 28 U.S.C. § 1291 in that this is an appeal from a final decision of the United States District Court. The District Court had jurisdiction pursuant to 42 U.S.C.§ 2000e-16(c). This Court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964.
The plaintiff is relying on a writ of certiorari for these reasons:

(1) A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The plaintiff's petition is requesting that the Court exercise its supervisory power on whether the Eleventh Circuit Court of Appeals has an obligation to complete judicial process and render a signed judgment order/opinion to the plaintiff. The plaintiff requested a signed judgment order/opinion from the Eleventh Circuit of Appeals and his request was denied.

(2) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with revelant decisions of this Court.

The plaintiff's petition is requesting the Court to uphold the decisions by the Equal Employment Opportunity

Commission deciding that his federal EEO complaint was timely appealed on all issues. The EEOC also determined that the federal agency in question misapplied establish law and misdirected the plaintiff in the wrong forum on his initial complaint to the federal EEO counselor and was wrongfully terminated from his position. (App 43-49) The Court has upheld that the decisions concerning federal EEO complaints are binding on the federal government.

CONSTITUTIONAL PROVISIONS

ARTICLE III JUDICIAL DEPARTMENT

SECTION 1 FEDERAL COURTS

The Judicial power of the United States shall be vested in one Supreme Court, and in inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2

1.The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States , and treaties made, or which shall be made, under their authority;---- to all cases affecting ambassadors, other public ministers and consul;---to all cases of admiralty and maritime jurisdiction;---to controversies to which the United States shall be a party;----to controversies between two or more States;--- between a state and citizen of another State;--- between citizens of a different State;---between citizens of the same State claiming lands under grant of different States, and between a State, or the citizens thereof , and foreign States, citizen and subjects.

2. In all cases affecting ambassadors , other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned , the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, under such regulations as the Congress shall make.

AMENDMENTS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

1. All persons born or naturalized in the United States , and subject to the jurisdiction thereof , are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of laws.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

STATEMENT OF THE CASE

In April, 1981, John Edward Corbett, plaintiff/petitioner was hired by the United States Army Missile and Space Intelligence Center (MSIC), Redstone Arsenal, Alabama as an Intelligence Research Specialist, GS-132-7.

The plaintiff was promoted non-competitively to GS-9 after an agreement to successfully obtain a Top Secret Clearance was fulfilled.

Around June, 1985, the plaintiff contacted the Equal Employment Office (EEO) at Redstone Arsenal, Alabama about not being promoted beyond GS-9 as other similar situated Intelligence Research Analyst who had entered the journeyman career program. The plaintiff then suffered three adverse disciplinary actions which were misdirected in the wrong forum, the local bargaining union at Redstone Arsenal, Alabama. The plaintiff was denied the use of the EEO procedure at Redstone Arsenal, Alabama. The plaintiff was not a member of the local bargaining union at Redstone Arsenal, Alabama and had no due process rights once leaving the procedure. The adverse actions were a reprimand, a three-day suspension and a removal from federal service. The removal action was paramount to this case and the effective date was on January 15,1987.

The plaintiff unsuccessfully tried to file a formal complaint of discrimination on his termination on January 30, 1987. After being denied access to the EEO procedure, the plaintiff filed a formal complaint of discrimination for being denied the use of the management directive EEO procedure on September 28, 1987. The plaintiff's original charge of discrimination pertaining to the removal was not accepted for investigation until 1995. In 1995 the plaintiff was notified that the Missile and Space Intelligence Center was now apart of the Defense Intelligence Agency.

REASONS FOR GRANTING THE PETITION

(A) A United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

(B) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with revelant decision of this Court.

The questions presented to this Court are:
(1) Whether the Eleventh Circuit Court of Appeals erred when it refused a request by the plaintiff to receive a signed judgment order/ opinion to go forward to the Supreme Court with an appeal.

The Eleventh Circuit Court of Appeals committed clear and reversible error when it proposed and unsigned judgment order/opinion to the plaintiff that would not be reviewed by the Court.

The Court has publicly displayed on its official website that unsigned judgment/order opinions will not be reviewed with any comment. (App. 3)

(2) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff's retaliation claim was untimely.

According to the record, the Appeal's Court is correct that the Agency was ordered to assist the plaintiff in articulating his claims. The plaintiff did not receive contact from the EEO office until he received a response to his contact letter to the Department of the Army on 5 December 1994 requesting what should he do at this time. The calls to the Department of the Army's Redstone Arsenal's EEO Office never informed the plaintiff that the Missile and Space Intelligence Center was no longer a part of the Department of the Army. Around December 15, 1994 the plaintiff received a letter from Charles L. White, director for the Management Diversity Office stating that the Missile and Space Center was no longer a part of the Department of the Army and the agency was now a part of the Defense Intelligence Agency. The December 13, 1994 letter specifically stated that no action was required of the plaintiff at the present time. The December 13, 1994 letter suggested that I could add retaliation as an additional basis to the complaint prior to the investigation. Part 1614.106 (d) of the Equal Employment Opportunity Commission states that a complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. In EEOC Appeal No. 0193071, January 19, 2001 decision, EEOC states that retaliation was timely appealed.(App. 39) "The government is bound by a prior finding of discrimination where a plaintiff brings an action to enforce an EEOC decision." This statement is from an 11th Circuit Court of Appeals decision in agreement that EEOC decisions in federal employee discrimination claims are timely. Moore v. Devine 780 F. 2nd 1559, 1564 (11th Cir. 1986). It is not the courts duty to review the substance for an EEOC determination. EEOC v. Sears Roebuck & Co. 24 Fed 937, 940 (N.D. GA 1980), 490 f. Supp 1245, 22 FEP 1479 (M.D. Ala. 1980).

In the case of the Securities and Exchange Commission v. Chenery Corporation, 322 U.S. 194, 209-9. The Supreme Court states that:

> "The Commission's conclusion here rest squarely in the area where administrative judgments are entitled to the greatest amount of weight by Appellate Courts. It is the product of administrative experience ,appreciation of the complexities of the problem, realization of the statutory policies and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process... whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb".

The Supreme Court further states that the action of the administrator is rarely found to be "arbitrary or capricious" as long as the administrator has apparently conducted himself properly. Federal Communication Commission v. Woko, 329 U.S. 223, 229. The power to investigate is a continuing power, with the result that the administrative agency can , in effect, put the party on probation and require periodic reports to show whether the party has complied with the law. United States v. Morton Salt Co. 338 U.S. These arguments clearly lend support that the plaintiff's retaliation claims were timely in all respects according to Part 1614. 106(d) of the Equal Employment Opportunity Commission.

When the plaintiff has been misled, the tolling doctrine continues to have vitality. The Supreme Court's decision in Electrical Workers, IUE v. Robbins & Myer, Inc., 429 U.S. 229, 13 FEP 1813 (1976)

In the decision of Reeb v. Economic Opportunity, Atlanta, Inc., 516 F. 2d 924, 11 FEP 235 (5th Cir. 1975) which was

decided prior to the Supreme Court's decision state that "The statue of limitations will be tolled when the defendant affirmatively seeks to mislead the charging party."
The Second Circuit has made the following observation in the case of Smith v. American President Lines, Ltd., 571 F. 2d 102, 16 FEP 712 (2nd Cir 1978)
In this case the Second Circuit states that:

> " The Court (Supreme) implied that the tolling might be appropriate only where the has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights, or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum."

(3) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the EEOC never found that the Army discriminated against the plaintiff.

In EEOC Appeal No. 1934622, June 24, 1994 decision , the EEOC explicitly states that: (App. 43-49)

> "Pursuant to 29 C.F.R. 1613.216(a), the regulation in effect during the period in question, the Agency was required to thoroughly investigate the matter(s) complained of once the complaint had been accepted."

The termination in the case was the paramount issue and was never addressed resulting in the plaintiff being removed from his position.(App. 43-62) The panel of judges states that this decision only addresses that the Agency did not give the plaintiff a "complete and fair investigation" as required by law and ordered the case be sent back to complete a fair investigation. The Supreme Court has discussed in General Telephone Co. of Northwest v. EEOC where the EEOC investigation uncovers discrimination unrelated to the original charge, then EEOC pursues the unrelated discrimination and files a Commissioner's charge so as to give the respondent notice and an opportunity to participate

in the investigation prior to the issuance of a determination. The Supreme Court states in comments to this case: "Yet the Court of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violation that EEOC ascertains in the course of a reasonable investigation of the charging party's complaint is actionable". General Tel. Co. of the N.W. v. EEOC, 446 U.S. 318, 22 FEP 1196 (1980).

(4) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff has failed to present a genuine issue of material fact as to whether Rumsfeld's proffered reasons for removing him from his position were pretextual.

The plaintiff presented an affidavit written by Harold Harris, a black male supervisor at the Missile and Space Intelligence Center, Redstone Arsenal, Alabama stating that he witnessed racial bias and feared retaliation while he was employed by the Agency. The plaintiff and Marcus Jones witnessed the affidavit. The paramount reason for removing the plaintiff from his position was that his supervisor accused him of physically attacking him on the job. This was not true and no evidence is in the record to support his being removed from his position and the real reason was due to race and sex discrimination and retaliation for prior EEO activity.

(5) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff failed to cite any authority holding that the failure to properly process an EEO claim is actionable under Title VII.

The Equal Employment Opportunity Commission determined that the actions of the EEO counselor at Redstone Arsenal interfered with the processing of the plaintiff's removal. (App. 43-49)

In the Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, section 703 (a) states that it shall be an unlawful practice for an employer----

(1) To fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, condition or privi leges of employment, because of such an individuals race, color, sex or national origin.

The EEO counselor had a duty to insure the proper processing of the plaintiff's complaint because the EEO office in federal agencies comes from a management directive. The privilege of a federal employee is that he has a right to have his complaint processed in a proper fashion free from restraint according to this statue. This statue was stated before the Appeals Court.

(6) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that the plaintiff waived his claim that that the District Court erred in its determination that he was not subject to 5 U.S.C. § 7121(d).

The EEOC uncovered during its investigation that the plaintiff did not belong to the local union at Redstone Arsenal and was not subject to 5 U.S.C. § 7121(d). This charge was not specified in detail by the plaintiff but ascertained by EEOC, which makes it actionable. The Supreme Court discussed this issue in General Telephone Co. of the Northwest v. EEOC. The Eleventh Circuit Court of Appeals has previously decided in Moore v. Devine 780 F. 2nd 1559,1564 (11th Cir. 1986) that the federal government is bound to a finding of discrimination. When the Agency subjected the plaintiff to 5 U.S.C. § 7121 (d) being in full knowledge that he was not a member of the local bargaining union grievance procedure was discriminatory by federal law. The plaintiff amended his complaint on April 10,2002 as one complaint as the Equal Employment Opportunity Commission did in investigating the complaint.

The plaintiff has previously stated that his complaint is treated as one complaint and brought forward as one complaint by EEOC. The plaintiff stated in part C (3) of the amended complaint that EEOC states in part 1614:

> "When on appeal, the dismissal of portion of a complaint is upheld but the remainder of the complaint is to be processed administratively, the Commission does not intend to force the complainant to proceed to court on the dismissal portion at that time. Instead, the Commission can wait until a final decision is issued by the agency on the remainder of the complaint".

It would be unreasonable to believe that the plaintiff would abandon any part of his complaint that would bring him relief.

(7) Whether the Eleventh Circuit Court of Appeals erred in its decision to conclude that any error in failing to provide the plaintiff with a true and correct transcript of the hearing on Rumsfeld's alternative motions to dismiss or for summary judgment was harmless.

In Federal Rules of Civil Procedure Rule 80 (c) states that a transcript :

> "Whenever the testimony of a witness at a trial or hearing which is stenographically reported is admissible in evidence at a later trial, it may proved by the transcript, therefore, duly certified by the person who reported the testimony."

The court reporter who transcribed this hearing was a federal court employee in which the clerk of the court has a duty to insure that each document, which comes to the court, or leaves the court, must be signed. The plaintiff was harmed by the District Court, which neglected its duty to insure that the transcript the plaintiff received was signed that it was

true and correct. (App. 10-11) The original un-signed court transcript was submitted to the Court of Appeals and addressed on September 15, 2003.

CONCLUSION

The plaintiff has shown in this petition that the Eleventh Circuit Court of Appeals has violated the plaintiff's rights according to Article III, Section 1, Section 2(1) and Amendment 5 and XIV of the United States Constitution. The plaintiff also has shown that his rights have been violated according to the Title VII of the Civil Rights Act of 1964. The plaintiff has shown in this petition that the Eleventh Circuit and the Supreme Court has decided with the Equal Employment Opportunity Commission when it comes to the investigation of federal Title VII discrimination claims. The plaintiff is requesting from the Court to exercise its supervisory judicial powers to ensure that the plaintiff receives judicial process according to the United States Constitution.

John Edward respectfully requests that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14128

District Court Docket No.
01-01717-CV-BE-NE

JOHN EDWARD CORBETT
Plaintiff – Appellant

versus

DONALD H. RUMSFELD, Secretary,
Department of Defense(Defense Intelligence Agency)
Defendant – Appellee

Appeal from the United States District Court
for the Northern District of Alabama

(Filed February 27, 2004, Issued as Mandate May 25, 2004)

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinions included herein by reference, is entered as the judgment of this Court.

Entered: February 27, 2004
/ s / For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy /s/

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 03-14128-CC

JOHN EDWARD CORBETT,

Plaintiff- Appellant

versus

DONALD H. RUMSFELD, Secretary
Department of Defense (Defense Intelligence Agency),

Defendant- Appellee

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION (S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19____,
_____F.2d___)

(Filed May 17, 2004)

Before: Anderson , Barkett and Wilson, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are Denied and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition (s) for Rehearing En Banc are Denied.

ENTERED FOR THE COURT,
/S/ Barkett
UNITED STATES CIRCUIT JUDGE

Supreme Court of the United States
2003 TERM COURT ORDERS

The vast majority of cases filed in the Supreme Court are disposed of summarily by unsigned orders. Such an order will, for example deny a petition for certiorari without comment. Regularly scheduled list of orders are issued on each Monday that the Court sits, but "miscellaneous" orders may be issued in individual cases at any time. Scheduled order lists are posted on this Website on the day of their issuance, while miscellaneous orders are posted on the day of issuance or the next day.

3/14/04

http:/www.supremecourtus.gov/orders/03ordersofthecourt.html

App. 4

United States Court of Appeals

Eleventh Circuit

56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn, Clerk

March 11,2004

JOHN EDWARD CORBETT
3623 MARYMONT DR NW
HUNTSVILLE AL 35810-2857

RE: 03-14128-CC John Edward Corbett v.Donald H. Rumsfeld
DCDKT NO : 01-01717 CV –BE-NE

The papers you recently submitted to this office are being returned for the reason stated.

This Court is returning your copy of the opinion. Please be advised that orders/opinions issued by a panel of this court is/will not be signed by judges. Note: Opinions are not signed by the judge(s).

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Eleanor Dixon (404) 335-617
(initialed E.D)

Encl.

App. 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCH 8, 2004

RE: 03-14128-CC JOHN EDWARD CORBETT v.
DONALD H. RUMSFELD
DC DKT NO: 01-01717-CV-BE-NE

TO THE CLERK OF THE COURT;

The plaintiff/appellant received a copy of the order in the above titled case unsigned. The plaintiff/appellant respectfully request a signed copy of this order by one of the panel judges in order to successfully appeal to the Supreme Court.

Enclosed is a copy of the unsigned court order.

Thank You,
John E.Corbett
3623 Marymont Drive
Huntsville, Alabama 35810
(256) 852-8380

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14128-CC
Non- Argument Calendar

D.C. Docket No. 01-01717-CV-BE-NE
JOHN EDWARD CORBETT

Plaintiff - Appellant

verses

DONALD H.RUMSFELD

Defendant/Appellee
Secretary, Department
0f Defense

Appeal from the United States District Court
for the Northern District of Alabama

(Filed February 27, 2004)

Before ANDERSON, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

John Edward Corbett appeals the district court's order granting the motion filed by Donald Rumsfeld, the Secretary of Defense, to dismiss, or, in the alternative, to grant summary judgment in Corbett's employment discrimination suit, filed pursuant to Title VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000, et seq., the U.S. Constitution, and 42 U.S.C.§§ 1981, 1983 and 1985. We find no merit to Corbett arguments on appeal.

First, even accepting as true Corbett's excuse for filing a retaliation claim eight years after his removal from employment, the record shows without doubt that he failed to present this claim within 30 days of the EEOC's 1994 order directing the EEO office to assist him in articulating his claims. Thus this claim was properly dismissed. Second, although the district court might have erred in dismissing Corbett's removal claim, the court did not err in granting summary judgment against him on this claim and other race and gender related discrimination claims. Assuming, as the district court did, that Corbett established a prima facie case of discrimination, Corbett failed to present evidence raising a genuine issue of material fact that Rumsfeld's proferred legitimate, non discriminatory reasons for its adverse actions were pretext for unlawful discrimination. These reasons include Corbett's falsification of forms, submission of false information inconnection with an official investigation, and creation of three on-the- job disturbances.

We likewise find no merit to Corbett's claim that the district court erred in failing to enforce the EEOC's June 24, 1994, administrative decision, which he alleges found valid his discrimination claims. The EEOC, in appeal No. 1934622, did not enter a finding of discrimination; it only determined that the EEOoffice had not complied with a previous EEOC decision and was required to conduct a further investigation into Corbett's allegations. Nor is there merit to Corbett's claim that the district court erred in its determination that he was not entitled to file an EEO complaint and have it processed free of restraint or reprisal under 29 C.F.R. § 1614.105 (b). Corbett argues that the EEO counselor "interfered with and barred" him from filing a race and sex discrimination complaint, in violation of 29C.F.R. §

1614.105(g), which provides that the counselor shall not restrain the aggrieved person from filing a complaint. Corbett asserts that the EEO's failure to process his complaint denied him due process of law and "was paramount in the final decision to remove him." However, Corbett explicitly abandoned this issue in the district court at the hearing on Rumsfeld's motions; thus, he is barred from raising it on appeal. See Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1326(11th Cir. 2000) (appellant's failure to brief and argue issue in district court is grounds for finding that he abandoned issue). Because Corbett has failed to argue it sufficiently in his brief, he also waived his claim that the district court erred in its determination that he was not subject to 5 U.S.C. § 7121(d), which governs federal employees' election between grievance procedures. See Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573, n.6 (11th Cir. 1989) (holding that a defendant is deemed to have waived an issue where he fails to elaborate any on the merits as to the issue).

Finally, we find meritless Corbett's argument that the district court erred in failing to provide him with a true and correct transcript of the hearing on Rumsfeld's alternative motions to dismiss or for summary judgment. Corbett argues that the transcript of the hearing was incomplete in that certain arguments made by defense counsel, the court, and him, were omitted. Corbett further asserts that other favorable arguments were also omitted . He asserts that the court's actions disturbed him, placed the court's credibility in question and makes him question whether the administrative file has been altered. Assuming for argument's that the transcript of the oral hearing is incomplete, Corbett has not shown how the error affected his substantial rights. See also Fed.R.Civ.P. 61 (permitting the court to disregard any error or defect in the proceeding

which does not affect the parties' substantial rights). Further, there is nothing in the record that shows that Corbett sought to correct the record in the district court as directed by Fed.R.App.P 10(e).

In conclusion, after considering the record and brief of the parties, we discern no reversible error. The district court properly granted Rumsfeld's motions to dismiss or, alternatively, for summary judgment because (1) Corbett's retaliation was untimely (2) the EEOC never found that the Army discriminated against Corbett; (3) Corbett failed to present evidence raising a genuine issue of material fact as to whether Rumsfeld's proffered reasons for removing him from his position were pretextual; (4) Corbett failed to cite any authority holding that the failure to properly process an EEO claim is actionable under Title VII; (5) Corbett waived his claim that the district court erred in its determination that he was not subject to 5 U.S.C. § 7121 (d); and (6) any error in failing to provide Corbett with a true and correct transcript of the hearing on Rumsfeld's alternative motions to dismiss or for summary judgment was harmless.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JOHN EDWARD CORBETT	*	Case No. CV-01-BE-1717 --NE
v.	*	Birmingham, Alabama
DONALD RUMSFELD, Defendant	*	March 21, 2003
	*	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE KARON O. BOWDRE
UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFF:

John Edward Corbett
Pro Se
3623 Marymont Drive
Huntsville, Alabama 35810

FOR THE DEFENDANT

Carolyn Steverson
Assistant U.S. Attorney
1801 4th Avenue, North
Birmingham, Alabama 35203

FOR THE DEFENDANT

Patrick Kernan
US Army Litigation Division
Office Of The Judge Advocate
901 North Stuart Street
Arlington, Va. 22203

TERESA ROBERSON, RMR
Federal Court Reporter
1729 5th Avenue North
Birmingham, Alabama
35203

C E R T I F I C A T E

I hereby certify that the foregoing is a correct transcript from the record of the proceeding in the above –entitled matter.

_____ _____

TERESA ROBERSON, RMR DATE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JOHN E. CORBETT

Plaintiff,

vs. **Case No. CV 01-BE-1717-NE**

DONALD H. RUMSFELD,
Secretary, Department of Defense

Defendant.

MEMORANDUM OPINION

(Filed August 8, 2003)

This case is before the court on Defendant's Motion to Dismiss or, in the Alterative, for Summary Judgment (Doc. 27). The court held a hearing on this motion on March 21, 2003. The court, having considered the briefs and evidentiary submissions and having heard oral argument on this motion, finds that Defendant's Motion to Dismiss or, in the Alterative, for Summary Judgment (Doc. 27) is due to be GRANTED in its entirety for reasons stated on the Record and below.

I. Summary of Facts [1, 2]

[1] The fact set out below are gleaned from the parties' submissions of facts claimed to be undisputed, their respective responses to those submissions, and the court's own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the

nonmoving party. *See* Information Sys. & Network Corp. v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002). These are the "facts" for summary judgment purposes only. They may not be the actual facts. *See* Cox v. Adm'r U.S. Steel & Carnegie Pension Fund, 17 F. 3d 1386, 1400 (11th Cir. 1994).

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[2] The court notes that Plaintiff did not directly respond to Defendant's Summary of Material Facts as required by this court's Exhibit A to the Scheduling Order (Doc. 20). Instead, Plaintiff made unsupported statements and references to various exhibits, many of which are varying accounts of Plaintiff's version of events.

Plaintiff worked at the Missile and Space Intelligence Center (MSIC), at the time part of the Department of the Army, from June 9, 1981, until his termination on January 16, 1987. He initially worked as an Intelligence Research Specialist, GS-132-02. The MSIC promoted him to Intelligence Research Specialist, GS-132-09, on August 15, 1982.

At first, Plaintiff worked in the MSIC's Advanced Sensors Directorate under the supervision of Harold Harris, an African-American male. Plaintiff's job required him to work with systems analysts in the collection of classified Foreign Intelligence Signals (FIS). He sent computerized orders for FIS data to the National Security Agency (NSA) located in Fort Meade, Maryland. The Defense Intelligence Agency (DIA) monitored the NSA's abililty to provide requested information.

Plaintiff filed a discrimination complaint with the EEO office after he became dissatisfied with Mr. Harris' supervision of him. The Army resolved Plaintiff's administrative EEO complaint by approving Plaintiff's request for transfer to another section in February, 1985. The MSIC transferred him to MSIC's Collection Requirements Branch, where he worked under the

supervision of Branch Chief James Asquith and Group Leader James Flanagan, both of whom are white males.

Shortly after Plaintiff was transferred, Mr. Asquith began receiving complaints that Plaintiff was making excessive errors. Because Plaintiff was new to his position, Mr. Asquith took no action other than to inform Plaintiff that he was making errors and asked Plaintiff to make the necessary corrections. Nevertheless, Plaintiff's errors continued.

Because his job required him to send his own corrected messages, Plaintiff was aware of his performance errors. Further, Mr. Flanagan counseled Plaintiff on his errors, and Plaintiff attended meetings designed to discuss his errors with Mr. Asquith and Dr. Price, the Division Chief. Despite receiving repeated warnings, Plaintiff continued to make errors, which resulted in notification from the DIA and the NSA could not fulfill requests from Plaintiff due to excessive errors.

In June, 1985, Jenny Marine, GS-7 Intelligence Aide, went on extended leave because of surgery, leaving Plaintiff's section short-staffed. As a result of Ms. Marine's absence Plaintiff, Mr. Flanagan, and other employees shared Ms. Marine's duties. From September to November, 1985, Plaintiff began refusing to do not only the work previously done. Marine but also ceased doing a lot of his own work, claiming he was only assigned to do clerical work, including signing for classified documents, filing documents, and opening a safe. Plaintiff stated: "I decided that it would be best for me to not continue to perform the clerk's duties and to concentrate on my own. In the next couple of months, Flanagan continued to place the clerk's duties on my desk and I ignored them." Plaintiff further stated: "I will not do any duties that will not merit me for advancement out of job no. 33,764." On one occasion in February, 1986, Plaintiff refused to open a safe and code forms when told to by Mr. Flanagan. Plaintiff testified he refused to perform certain

duties requested by Mr. Flanagan despite being previously counseled by Asquith that he needed to perform any duties assigned by Mr. Flanagan.

Mr. Flanagan reported Plaintiff's refusal to do work to Mr. Asquith. When Plaintiff learned Mr. Flanagan had discussed the situation with Mr. Asquith, Plaintiff invited him to the parking lot where both exchanged curse words and Plaintiff threatened Mr. Flanagan. In January 1986, MSIC issued Plaintiff a letter of reprimand for disobeying Mr. Flanagan's order to open a safe and code forms.

On or about March 26, 1986, Maj. Ronald Love of the MSIC contacted Mr. Asquith "...in an effort to curtail what [had] become a significant problem...over the last six to nine months..." at the NSA. Maj. Love indicated that Plaintiff did not properly use the computer system designed to transmit data requests. In response to the NSA's complaints, Plaintiff, on March 27, 1986, sent a letter, on MSIC letterhead, to the NSA and responded to the allegations. The Army suspended Plaintiff for three days for unauthorized use of government property and for failing to follow established procedures for approval of outgoing correspondence.

On September 3, 1986, Mr. Asquith prepared a proposed Disciplinary Action for Plaintiff that listed occurrences that later became part of the reasons for Plaintiff termination. When Plaintiff confronted Mr. Asquith, on October 1, 1986, about the listed occurrences, Plaintiff took a blocking stance, crossed his forearms, and prevented Mr. Asquith from leaving the area. When Mr. Asquith yelled for help, Plaintiff ceased his behavior. Two days later, Plaintiff attempted to contact an EEO counselor. However, Plaintiff did not meet with an EEO counselor until November 19, 1986, because he requested a particular EEO Counselor who was not then available.

On December 11, 1986, Mr. Asquith proposed to remove Plaintiff for falsifying a safe and cabinet security record, DA Form 672, for submitting false information to a grievance investigator conducting an official investigation, and for creating a disturbance. The removal letter that followed, dated January 15, 1987, advised Plaintiff of his right to grieve the action taken against him under the Department of Army grievance procedure. On the same day, Plaintiff received his final interview with the EEO Counselor concerning his October 3, 1986 informal complaint. One day later, on January 16, 1987, Plaintiff was removed from federal service.

By letter dated January 27, 1988, Plaintiff filed a grievance[3]

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[3]Regulation 690-20 requires the grievance process be initiated by submitting the grievance in writing through supervisory channels such as the MSIC Director. Allegations of race and sex discrimination cannot be processed under the grievance policy but only through the EEO administrative procedure.

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over his removal from federal service. On January 30, 1987, Plaintiff filed a formal administrative complaint that alleged that, based on his race (African-American) and sex (male): 1) an August 26, 1986 report plaintiff prepared was given to another employee for the correction of errors and plaintiff was not informed; 2) information regarding errors on his data requests to the National Security Agency was withheld from him; and 3)he was not informed of or instructed on the major elements of his job performance from January 1, 1986 through December 31, 1986.

On February 20, 1987, the U.S. Army Civilian Appellate Review Agency 9USACARA) appointed Mr. Jim Biggs to investigate the January 27, 1987 grievance. Plaintiff wrote a letter to Mr. Biggs on March 9, 1987, stating that his removal was based on "race and sex." On March 19, 1987,

USACARA notified Plaintiff his grievance would be held in abeyance until a determination was made on his discrimination allegations.

On February 3, 1987, the Army issued a Final Agency Decision (FADI), rejecting Plaintiff's January 30, 1987 formal administrative complaint because Plaintiff failed to timely contact an EEO counselor. On February 10, 1987, Plaintiff appealed the FAD1 to the Office of Federal Operations (OFC) of the Equal Employment Opportunity Commission (EEOC).

On July 8, 1987, the EEOC OFO issued a decision finding that the army failed to comply with its obligations to assist Plaintiff in the clarification and articulation of his allegations during EEO counseling.The EEOC OFO vacated the Army's FAD1 and remanded Plaintiff's complaint to the Army for further action. On remand, the Army gave Plaintiff additional counseling. An addendum to the revised EEO counselor's report indicated that several witnesses were interviewed regarding Plaintiff's allegations and that a reprimand, a three-day suspension, and a notice of removal of Plaintiff were among the subjects discussed. The addendum indicated that, on August 20, 1987, Plaintiff provided a historical summary of events to the EEO counselor.

On August 6, 1987, Plaintiff contacted an EEO counselor alleging that, because of his race and sex, the Army mishandled his January 1987 complaint. The EEO counselor's report listed the allegations as follows: 1) an unusually long delay in obtaining an EEO counselor (October 3 to November 19, 1986); 2) the EEO counselor failed to cover areas concerning the adverse actions Plaintiff received and failed to speak with all witnesses named by Plaintiff; and 3) the EEO Office failed to send Plaintiff a copy of the EEO counselor's report.

Plaintiff, on September 28, 1987, filed a second formal complaint containing his new allegations concerning the EEO office's mishandling of his original administrative complaint. On February 8, 1989, the Army issued a second final agency decision (FAD2), finding no discrimination regarding the following allegations 1) Plaintiff was held accountable for errors in reports that were not made known to him; 2) other employees were allowed to correct his work with out his knowledge; 3) he was not informed about, nor was he provided instruction on specific duties related to his job; 4) he was not informed of the major elements of his performance standards; and 5) his complaint was not properly processed.

Plaintiff appealed the Army's FAD2 to the EEO OFO on February 20,1989. On appeal, Plaintiff asserted that his most important allegation concerning his termination was never accepted by the Army's EEO office. Plaintiff claimed that the EEO counselor told him that all statements taken during the intake interview would be addressed as part of his complaint and investigated. Plaintiff asserted that the statements he gave to the EEO counselor addressed specific allegations of mistreatment in the office, disciplinary actions he received, promotions he was denied, and his termination from the Army.

The EEOC issued a decision on January 31, 1992, affirming the Army's FAD2 finding of no discrimination regarding the five allegations it has addressed. As to Plaintiff allegation that the Army improperly failed to address his termination, the EEOC found that the Army was not obligated to address this allegation because it was not contained in Plaintiff's formal complaint, or in the addendum to that formal complaint, or in the second formal complaint.

On February 20, 1992, Plaintiff asked the EEOC to reopen and reconsider its decision dated January 31, 1992. In his request, Plaintiff asserted that the EEO counselor told

him she could not accept his termination as part of his complaint. Plaintiff also asserted that, during the time that the initial EEO counselor was preparing the EEO counselor's report, the Army withheld the information that it had proposed his termination. Finally, Plaintiff alleged that the "adverse actions" that the EEO counselor had improperly failed to cover were his written reprimand, his three-day suspension, and his termination.

The EEOC OFO, on July16, 1992, granted Plaintiff's request for reconsideration and directed the Army to determine if issues raised by Plaintiff were continuing violations. On August 23, 1993, the Army issued a third Final agency Decision (FAD3), finding no discrimination. Almost one year later, on June 24, 1994, the EEOC vacated the Army's FAD3 and remanded the case back to the Army for further investigation of the allegations.

On January 10, 1995, Plaintiff sent a letter to the Army adding "reprisal" as an additional basis for his complaint. The Office of Complaint Investigation (OCI) [4], on April 21, 1995, found no

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[4] The OCI is the Army's investigative agency for EEO complaints

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discrimination or reprisal on the nine issues addressed in the investigation. On May 11, 1995, the Army notified the EEOC of Plaintiff's request for a hearing. Plaintiff, on December 16, 1997, requested a FAD from the Army and the right to proceed to federal court.

On February 18, 1998, the Army issued another Final Agency Decision (FAD4), finding no evidence to support the allegations of discrimination on the nine issues alleged. Plaintiff appealed the FAD4 to the EEOC OFO on March 9, 1998. On January 19, 2001, the EEOC OFO issued a

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decision affirming the Army's FAD4. Plaintiff's request for reconsideration by the EEOC OFO was denied on June 29, 2001.

On April 10, 2002, Plaintiff filed a Complaint (Doc.1) alleging race and sex discrimination as well as various other constitutional and statutory violations. This court, by order dated March 27, 2002 (Doc. 6), required Plaintiff to amend his complaint. The court notes that Plaintiff has proceeded throughout this case *prose* and that every benefit of every doubt has been given to Plaintiff in this court's attempt to decipher his allegations in his complaint. During his deposition, however, Plaintiff stated that his Complaint consists of the following two issues: 1) is removal from federal service; and 2) improper actions taken by the EEO office. Specifically, Plaintiff argued that a substantial delay in getting a counselor transpired; the EEO counselor failed to cover certain areas; and the EEO counselor allegedly failed to talk to witnesses.

II. DEFENDANT'S MOTION TO DISMISS (DOC. 27-1)

Defendant filed a Motion to Dismiss or , in the Alternative, For Summary Judgment (Doc. 27), arguing that Plaintiff failed to state a claim under the United States Constitution and under 42 U.S.C. §§ 1981, 1983, and 1985, and that Plaintiff's claims concerning his removal and retaliation are untimely. For reasons stated below and elaborated on in the record, this court finds that Defendant's Motion to Dismiss(Doc 27-1) is due to be GRANTED.

A. Motion to Dismiss Standard of Review

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint because the plaintiff has failed to state a claim upon which

relief can be granted. Fed R.Civ. P.12 (b)(6). A Rule 12(b)(6) motion questions the legal sufficiency of a complaint; therefore, in assessing the merits of a Rule 12(b)(6) motion, the court must assume for purposes of this motion that all the factual allegations set forth in the complaint are true. See United States v. Gaubert, 499 U S. 315, 327 (1991); Powell v. Lennon, 914 F.2d 1459, 1463(11th Cir. 1990). Moreover, all factual allegations are to be construed in the light most favorable to the plaintiff. See Brower v. County of Invo, 489 U.S. 593, 598 (1989). "A complaint should not be dismissed for failure to unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle[him] to relief." In re Johannesssen 76 F.3d 347, 349 (11th Cir. 1996) (citing Conley v. Gibson, 355 U.S. 41, 45-46(1957).

B. Plaintiff's Claims

1. Plaintiff's Claims Asserting Violation of the United States Constitution

In his Complaint, Plaintiff stated that "[j]urisdiction of this Court is invoked pursuant to …the Fifth Admendment to the Constitution." Defendant, in its Motion to Dismiss(Doc 27-1), asserted that Plaintiff cannot bring a constitutional claim against it because Title VII affords Plaintiff an exclusive remedy for claims of discrimination in federal employment. Plaintiff, in his Opposition to Defendant's Motion to Dismiss(Doc. 31), apparently concedes that his constitutional claims should be dismissed. Further, at the March 21, 2003 hearing, Plaintiff did not contest this court's dismissal of his constitutional claims. For reasons stated on the Record in open court, this court hereby Grants Defendant's Motion to Dismiss on Plaintiff's constitutional

claims and hereby DISMISSES Plaintiff's allegations of constitutional violations under Fifth Amendment of the United States Constitution.

2. Plaintiff's Claims Asserting Violations of 42U.S.C. § 1981, § 1983 and § 1985

A. Plaintiff's § 1981 Claim

Plaintiff, in his Complaint, attempts to state a claim under 42 U.S.C. § 1981. Defendant argued before this court that Plaintiff's 1981 claim should be dismissed because Title VII is Plaintiff's exclusive remedy in this case. In Canino v. E.E.O.C., 707 F.2d 468, 472 (11th Cir. 1983), the court stated that the plaintiff's § 1981 claim was properly dismissed because of Title VII provides an exclusive judicial remedy for alleged employment discrimination for federal employees. *See also* Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998) (holding that "[s]ection 1981 provides a cause of action for individuals subjected to discrimination by private actors and discrimination under color of state law, but dos not provide a cause of action for discrimination under federal law.") Based upon Canino and upon Plaintiff's concession that his § 1981 claim is due to be dismissed in his written submission and at the March 21, 2003, hearing, this court hereby GRANTS Defendant's Motion to Dismiss on Plaintiff claim under § 1981 and hereby DISMISSES plaintiff's § 1981 claim.

B. Plaintiff's § 1983 Claim

In addition to his § 1981 claim, Plaintiff attempted to state a § 1983 claim in his Complaint. Defendant, once again, argued that Title VII is Plaintiff's exclusive remedy for a federal employee's claims of discrimination. This court recognizes that § 1983 has no application in Plaintiff's case

because Plaintiff has stated a § 1983 claim against a *federal* officer. *See* Mays v. United States Postal Service, 928 F. Supp. 1552, 1557 n. 4 (M.D. Ala. 1996). Further, Plaintiff conceded in his Opposition to Defendant's Motion to Dismiss and at the March 21, 2003 hearing that his claims are brought solely under Title VII. The court hereby GRANTS Defendant's Motion to Dismiss on Plaintiff's claim under § 1983 and hereby DISMISSES Plaintiff's § 1983 claim.

C. Plaintiff's § 1985 Claim

Plaintiff has also attempted to state a claim under § 1985. Section 1985 prohibits conspiracy to deprive a person of rights created elsewhere, but essentially creates no substantive rights. *See* Mays, 928 F. Supp. at 1561 (*citing* United States v. Guest, 383 U.S. 745 (1966). In Great American Fed. Sav. & Loan Assoc. v. Novotny, 442 U.S. 366, 378 (1979), the Supreme Court held that § 1985 available, the plaintiff "could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title Vii," among other things. Novotny, 442 U.S. at 376. In light of the applicable case law and Plaintiff's concession that his claims under § 1985 should be dismissed, this court hereby GRANTS Defendant's Motion to Dismiss on Plaintiff's claim under § 1985 and hereby DISMISSES Plaintiff's § 1985 claim.

3. Plaintiff's Claim Concerning Removal and Retaliation

A. Plaintiff's Removal Claim

At the March 21, 2003, hearing, this court found, for reasons stated in the Record, that Plaintiff failed to timely raise his allegation of removal from federal service in the

administrative EEO process because Plaintiff did not file a formal complaint within fifteen days of his notice of final interview concerning his removal from federal service. Accordingly, this court finds that Plaintiff's allegations of discrimination in his removal are due to be DISMISSED.

A federal employee must timely exhaust administrative remedies for any claim of employment discrimination before filing suit in District Court under Title VII. *See* Brown v. General Serv. Admin., 425 U.S. 820, 833 (1976). The required administrative procedures for federal employees alleging discrimination o reprisal were found at 29 C.F.R. §§ 1613.210 *et seq.*[5] At the time, a federal employee who believed he or she had been the subject of prohibited employment discrimination or retaliation had to contact an EEO counselor within thirty calendar days of the alleged discriminatory event. 29 C.F.R. §§ 1613.214(a)(l)(i). After an informal investigation, the EEO counselor notified a plaintiff of his right to file a complaint of discrimination with an agency official. The employee had to submit a formal complaint

[5] In 1991, 29 C.F.R. §§ 1614.101-607 changed the time limit for the initiation of contact with an EEO counselor and the filing of a formal EEO complaint. To initiate processing of a particular claim , an aggrieved federal employee must now consult with an EEO counselor within forty-five days of the alleged discriminatory event, or within forty-five days of the date that the employee knew or reasonably should have known of the discriminatory action. 29 C.F.R. 1614.105(a)(1). If the matter is not resolved by informal pre-complaint counseling, the agency must provide the employee with notice of the right to file a formal complaint of discrimination. 29 C.F.R. § 1614.105(d). After receipt of notice, the employee has fifteen days to file the formal complaint. 29 C.F.R. § 1614.106(b)

of discrimination in writing, signed by the complainant or his representative, to the agency within fifteen calendar days after the employee's receipt of the notice of right to file a complaint. 29 C.F.R. §§ 1613.213(a), 1613.213(a)(l)(ii).

The EEOC rules are not mere technicalities, but integral parts of Congress'statutory scheme of achieving a "careful blend of administrative and judicial enforcement powers." Brown, 425 U.S. at 833. If an employee fails to timely file an administrative complaint, then the employee has failed to exhaust his administrative remedies, and the claim should be dismissed. The Supreme Court has repeatedly upheld dismissal or summary judgment in cases where a plaintiff has failed to timely or properly exhause an administrative discrimination complaint. *See, e.g.,* Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984); Delaware State College v. Ricks, 449 U.S. 250 (1980); United Air Lines v. Evans, 431 u.s. 553 (1977). Further, the Eleventh Circuit has held that a federal employee's unexcused failure to timely initiate an administrative discrimination complaint results in summary judgment or dismissal of the suit for failure to state a claim upon which relief may be granted. *See* Manning v. Carlin, 786 F.2d 1108, 1109 (11th Cir.1986).

On December 11, 1986, MSIC proposed to remove plaintiff for falsifying a safe and cabinet security record DA Form 672, for submitting false information to a grievance investigator conducting an official investigation, and for creating a disturbance. On January 15, 1987, Plaintiff received his final interview with the EEO counselor for his first complaint of discrimination involving allegations unrelated to the removal.[6] On January 16, 1987, Plaintiff received a letter notifying him that he was removed from federal service.

On January 27, 1987, Plaintiff, by letter, filed a grievance over his removal. Civilian employees may elect to pursue adverse employment decisions through the United

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States Army Civilian Appellate Review Agency (USACARA) or the EEO administrative process. (AR690-70 paragraph 1-8C and Collective Bargaining Agreement.)[7]

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[6]As noted above, Plaintiff contacted an EEO counselor for these allegations in October 1986.

[7]AR690-70, paragraph 1-8c states: Matters that can be appealed to the MSPB or are subject to final administrative review by the OPM or the EEOC may not be grieved...Whenever an employee files a formal grievance that duplicates matters under consideration by another authority(e.g. MSPB or the Special Counsel) or contains issues that will be considered by another authority while riling on a matter before it , the grievance will be cancelled. After the decision by the other authority, any remaining grievable issues may be presented as a formal grievance within 15 days after the grievant receives the decision. *DEX 49,Army Regulation 690-70.*

Employees being given a suspension of more than 14 days or removed from Federal Service are entitle to appeal to the Merit Systems Protection Board or may file a grievance under the negotiated grievance procedure contained in this Agreement, but not both. Employees cannot file an appeal, grievance, EEO complaint, or prohibited personnel practice on the same action.

DEX38, Collective Bargaining Agreement, June 19,1981

On January 30, 1987, Plaintiff filed another formal administrative EEO complaint in which he alleged that based on his race (African- American) and sex (male): (1) an August 26, 1986 report Plaintiff prepared was given to another employee for the correction of errors and Plaintiff was not informed; (2) information regarding errors on his data request to the National Security Agency was withheld from him; and (3) he was not informed of or instructed on the major elements of his job performance from January 1, 1986 through December 31, 1986. Plaintiff never raised nor mentioned his removal in either of his formal EEO complaints of discrimination.

Plaintiff first raised EEO allegations concerning his removal from federal service when he sent a letter to Jim Biggs, the individual investigating his grievance, claiming that his removal was based on race and sex. On March 19, 1987, USACARA notified Plaintiff that he should contact the EEO office about his claim of discrimination. When Plaintiff contacted the EEO office, it immediately began investigating his claim. This court finds, as elaborated on in the Record, that Plaintiff's letter to Mr. Biggs was sufficient to start the EEO process. Further, the court finds that Plaintiff timely contacted the EEO office after being advised to do by the USACARA. Therefore, the court finds that Plaintiff met the 30 day requirement within which to notify an EEO Counselor that he wished to make a claim of discrimination.

Even though this court found that Plaintiff timely contacted an EEO counselor, the court nevertheless finds that Plaintiff failed to file a formal complaint within fifteen days of the EEO office's notifying him of his right to file a formal EEO complaint. On March 9, 1987, Plaintiff wrote a letter to Mr. Biggs stating that his removal was based on "race and sex." On April 17, 1987, plaintiff received noticed of his final counseling interview. This notice advised Plaintiff he had fifteen days to file a formal complaint of discrimination. Plaintiff acknowledged receipt of this notice. On May 5, 1987, the EEO office notified Plaintiff that his EEO case was closed because fifteen days had passed and he had not filed a formal EEO complaint. Because Plaintiff failed to file a formal complaint of discrimination within fifteen days of his notice of right to file and because this court, as elaborated on in the Record, finds that no justification for equitable tolling of the EEO administrative process exists, the court finds that Defendants' Motion to dismiss (Doc27-1) is hereby GRANTED on Plaintiff's removal claims and that Plaintiff's removal claims are hereby DISMISSED.

B. Plaintiff's Retaliation Claim

At the March 21, 2003, hearing, the curt also found that Plaintiff's retaliation claim is due to be DISMISSED because Plaintiff failed to timely raise his retaliation claim with an EEO Counselor within thirty days of the alleged retaliatory event. Plaintiff initially raised race and gender as his claimed discriminatory bases in his administrative complaints. His removal from service was not raised in either of the complaints. Further, Plaintiff did not raise a retaliation claim. But in January 1995, almost eight years after Plaintiff left the Army's employment, Plaintiff sent a letter to the Army Adding " reprisal" as an additional bases for his complaint. Plaintiff exceeded the (30) day time limit to raise allegations of reprisal in his termination by several years.

The scope of a civil complaint is limited to the scope of the EEOC investigation that can be expected to grow out of allegations of discrimination. *See* Griffin v. Carlin 755 F.2d 1516, 1522 (11th Cir. 1985) (holding judicial compliant in a Title VII action is limited to the scope of the administrative investigation that could reasonably be expected to grow out of the charge of discrimination). Allegations that do not amplify, clarify, or more clearly focus earlier EEOC complaints cannot be brought in a judicial compliant. *See* Wu v. Thomas, 863 F.2d 1543, 1547, (11thCir. 1989). Plaintiff's allegation concerning retaliation in the instant judicial compliant is unrelated to the allegations contained in Plaintiff's formal administrative complaints. This court will not allow Plaintiff over eight year after he filed his initial EEO complaint to state an additional bases for compliant based on the same facts. A "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Alexander v. Fulton County, GA, 207 F.3d 1303, 1332 (11th Cir 2000) (quoting Mulhall v.Advance

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security, inc., 19 F.3d 586 n.8 (11th Cir. 1994)). In this case, Plaintiff alleges no new facts to allow an eight-year-late retaliation claim other than the allegations contained in his initial EEO complaint.

As elaborated on in the Record, this court finds that Plaintiff's retaliation allegation is hereby DISMISSED as untimely because it was filed several years after the allegedly discriminatory conduct and it does not, as a matter of law, relate back to Plaintiff's original complaints concerning his removal. Therefore, Defendant's Motion to Dismiss (Doc. 27-1) is hereby GRANTED on Plaintiff's removal claim.

C. Plaintiff's Claims Regarding the EEO Process

To the extent that Plaintiff attempts to base any cause of action on alleged flaws in the EEO procedure and the and the processing of his complaints, the court finds that Plaintiff's allegation this regard are not violations for which Plaintiff may receive redress by this court. For example, Plaintiff's Complaint lists allegations such as delay in getting an EEO counselor and the EEO counselor's failure to cover certain areas and talk with some designated witnesses. The court finds that, as a matter of law, deficiencies in the EEO process do not amount to an adverse personnel action for which Plaintiff's employment. An alleged failure to properly process an EEO claim in not actionable under Title VII because the deficiencies do not impact the terms and conditions of Plaintiff's employment. An alleged failure to properly process and EEO claim is not actionable under Title VII. Storey v. Rubin, 976 F. Supp 1478, 1483-84 (N.D. Ga 1997), aff'd, 144 F.3d. 56 (11th Cir. 1998) (table) (no implied remedy to challenge an agency's handling of a charge against the employer); Malladi v. Brown, 987 F. Supp.893, 918 (M.D. Ala. 1997) (holding allegation of unreasonable

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delay in responding to her written request for an EEO counselor's report and the inappropriate referral of her charges to the VA central office for procedural review did not amount to an adverse job action because there has been no showing of how these actions affected the terms and conditions of Plaintiff's employment). Therefore, the court hereby GRANTS Defendant's Motion to Dismiss (Doc. 27-1 and DISMISSES an claims relating to Plaintiff's allegations of deficiencies in the EEO process.

III. Defendant's Alternative Motion for Summary Judgment (Doc. 27-2)

Defendant filed, in the alternative to a Motion to Dismiss (Doc. 27-1), a Motion for Summary Judgment (Doc. 27-2), alleging that Plaintiff cannot establish a prima facie case of discrimination and that Plaintiff cannot show that Defendant's articulated legitimate, non-discriminatory reasons form Plaintiff's removal were pretext for discrimination. Although this court granted Defendant's Motion to Dismiss (Doc. 27-1) as stated above and on the Record at the March 21, 2003 hearing, this court finds that Defendant's Motion for Summary Judgment (Doc. 27-2) is due to be GRANTED in its entirety.

A. Summary Judgment Standard of Review

Summary judgment is an integral part of the Federal Rules of Civil Procedure and allows a trial court to decide cases when no genuine issues of material fact are presented and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The fact that the parties do not agree on each and every fact is not significant; the law requires on that "there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48

(1986). *See* also Celotex v. Catrett, 477 U.S. 317, 327 (1986). A factual dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 251-52. Mere speculation is insufficient to create an issue of fact and defeat a properly supported motion for summary judgment. *See* Ramsey v. Leath, 706 F.2d 1166, 11169-70 (11th Cir. 1983). However, all reasonable doubts about the facts should be resolved in favor of the non-movant. *See* Earley v. Chanpion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990)(citing Anderson, 477 U.S. at 252).

B. Plaintiff's Claims[8]

[8] In both parties' submissions, they failed to brief Plaintiff's retaliation claim in the context of summary judgment. Because this court granted Defendant's Motion to Dismiss (Doc. 27-1) on Plaintiff's retaliation claim, this court will refrain from

1. Plaintiff's Prima Facie Case

To establish a prima facie case of disparate treatment race discrimination based on circumstantial evidence,[9]

[9] Plaintiff does not contend that he has presented "direct evidence" in support of his claims of race discrimination, nor can he.

Plaintiff must show: (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) Defendant treated similarly-situated white employees more favorably, and (4) he was qualified to do the job. *See* Scott v. Suncoast Beverages Sales, LTD, 295 F.3d 1223, 1228 (11th Cir. 2002).

The court, in an effort to provide Plaintiff with every possible benefit of every possible doubt, assumed for purposes of argument at the March 21, 3003, hearing that Plaintiff met his burden of establishing a prima facie case. The court notes, however, that Defendant's argument that Plaintiff has not met his burden of establishing a *prima facie* case is a strong argument, and that Plaintiff, as elaborated on below, has not presented admissible evidence to support is *prima facie* case.

2. Defendant's Articulated Legitimate, Non-Discriminatory Reason

Because this court accepts, for purposes of argument, that Plaintiff met his burden of establishing a *prima facie* case, Defendant must then articulate a legitimate, nondiscriminatory reason for its adverse employment action. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Defendant asserts that it had several legitimate nondiscriminatory reasons for removing Plaintiff's job required him to work with systems analysts in the collection of classified Foreign Intelligence Signals (FIS). Shortly after Plaintiff assumed his job, Mr. Asquith, his supervisor, began to receive complaints that Plaintiff was making excessive errors. Because Plaintiff had just started in the job, Mr. Asquith took no action other than to inform Plaintiff of the errors and request him to make necessary corrections. The errors continued, however, and Plantiff committed repetitive errors in may instances. Plaintiff knew of his performance errors because his job required him to send corrected messages, Mr. Flangan counseled him on the errors, and because Plaintiff attended meetings with Mr. Asquith and Dr. Price, the Division Chief, where they discussed his performance errors. In spite of repeated warnings, Plaintiff continued to make errors resulting in notification from the

DIA that NSA could not fulfill requests from Plaintiff due to excessive errors.

On or about March 26, 1986, MAJ Ronald Love, MSIC, contacted Mr. Asquith "...in an effort to curtail a significant problem ... over the last six to nine months ..." at NSA. In the memorandum, MAJ Love stated that Plaintiff did not properly use a computer system designed in part to transmit data requests. MAJ Love also listed other numerous errors made by Plaintiff, including typographical errors.

In response to the complaints by NSA, Plaintiff sent a letter, under MSIC letterhead, to the NSA responding to the error allegations. Plaintiff's letter stated it was sent "... to try and acquit me of these charges stating that I am the culprit" and expressing his "hope that you can assure me a fair trial in the future before I am hung." NSA returned the Plaintiff's letter to MISC. Plaintiff's supervisors did not authorize Plaintiff to send the letter to outside organization so he was charge with misuse of government property and failure to follow proper signature authority. On July 22, 1986, plaintiff received a three-day suspension for this incident.

In June, 1985, Jenny Marine, GS-7 Intelligence Aide, went on extended leave because of surgery, leaving Plaintiff's section short-staffed. As a result of Ms. Marine's absence, Plaintiff, Mr. Flanagan, and other employees shared Ms. Marine's duties. From September to November 1985, Plaintiff began refusing to do not only the work previously done by Ms. Marine but also ceased doing a lot of his own work, claiming he was only assigned to do clerical work, including signing for classified documents, filing documents, and opening a safe. Plaintiff stated: "I decided that it would be best for me to not continue to perform the clerk's duties and to concentrate on my own. In the next couple of months, Flangan continued to place the clerks's duties on my desk and I ignored them. "I will not do any duties that will not

merit me for advancement out of job no. 33,734." On one occasion in February, 1986, Plaintiff refused to perform certain duties requested by Mr. Flanagan despite bring previously counseled by Asquith that he needed to perform any duties assigned by M. Flanagan.

Mr. Flanagan reported Plaintiff's refusal to do work to Mr. Asquith. When Plaintiff learned Mr. Flanagan had discussed the situation with Mr. Asquith, Plaintiff invited him to the parking lot where both exchanged curse words and Plaintiff threatened Mr. Flanagan. In January 1986, MISC issued Plaintiff a letter of reprimand for disobeying Mr. Flanagan's order to open a safe and code forms.

On or about September 30, 1986, Mr. Asquith issued Plaintiff a notice of proposed suspension for 10 workdays for falsifying a safe and cabinet security record, which submitted to an investigator conducting and official grievance investigation. Plaintiff admitted that he created a document he labeled "original" and forwarded it to the grievance investigator. MSIC withdrew the proposed suspension after Plaintiff confronted Mr. Asquith with his forearm to prevent Mr. Asquith from leaving a room. Although Plaintiff denies forcibly detained Mr. Asquith, Plaintiff admits he stood in the doorway blocking Mr. Asquith's exit, had a argument with Mr. Asquith, raised his voice to a level not normal in the workplace, and that Mr. Asquith yelled for help, causing others in the workplace to run over and intervene. This incident was one of three, which led to the proposal for Plaintiff's dismissal from federal service. As a result of Plaintiff's behavioral history, this court finds the Defendant has met its burden of producing legitimate reasons for removing Plaintiff from federal service

3. Plaintiff's Showing of Pretext

This court, at the March 21, 2003 hearing, found that Defendant articulated legitimate, non-discriminatory reasons for removing Plaintiff from federal service. As a result of this finding, the court then asked Plaintiff to show that Defendant's reasons were pretext for discrimination. Plaintiff could have satisfied his burden of persuasion by showing the court "that a discriminatory reason more than likely motivated the employer... {or} by persuading the court that the proffered reason for the employment decision is not worthy of belief." Hall v. Alabama Assoc. of Sch. Bds., 326 F.3d 1157, 1166 (11th Cir 2003). this court found that Plaintiff failed to make any showing that Defendant was either motivated by race or that any of Defendant's reasons for removing Plaintiff were pretext for discrimination.

First, the court finds that Plaintiff offered no evidence that Defendant's actions were motivated by unlawful animus. Plaintiff, by his own testimony, admits he never heard Mr. Asquith or Mr. Flanagan, his supervisors, make a racist comment. Mr. Flanagan testified neither race, sex, nor reprisal for protected activity played any part in the disciplinary actions taken against Plaintiff. Further, Dr. Price denied that MISC took any action based on Plaintiff's race, sex, or reprisal for protected activity. Lastly, Mr. Asquith testified that race, sex and reprisal for protected activity did not play or a part in any disciplinary action, but rather Plaintiff's conduct was the reason for his removal.

Secondly, Plaintiff, in support of his pretext argument, proffered inadmissible evidence and mere argument. Most of Plaintiff's assertions were in narrative form with no supporting citations as required by Fed. R. Civ. P. 56 and this court's Exhibit A to the Scheduling Order (Doc. 20). "{S}elf-serving statements of fact in a party's brief, not in proper affidavit form, may not considered in determining if a

genuine issue of material fact exists." Mays v. United States Postal Service, 928 F. Supp. 1552, 1566 (M.D. Ala. 1996). Plaintiff cannot rest on his pleadings and survive summary judgment. Federal Rule of Civil Procedure 56(e) states in part that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that thee is a genuine issue for trail. If the adverse party does not a respond, summary judgment, if appropriate, shall be entered against the adverse party," fed. R. Civ. P. 56(e).

Plaintiff proffered an unsworn statement from a now dead witness as evidence of pretext. Mr. Harold Harris' "affidavit," submitted by Plaintiff, did not state that Mr. Harris made the statement with personal knowledge, and it was not notarized. Nothing verified that the signature on the document was that of Mr. Harris. In addition to these technical difficulties with Mr. Harris' affidavit, the statement contradicts previous sworn testimony given by Mr. Harris. Thus, the court finds this document insufficient to show pretext.

Even more troublesome, in response to Defendant's Motion for Summary Judgment (Doc. 27-2), Plaintiff submitted a stack of unidentified, unverified documents and portions of documents, labeled "PEX" 1-33 and then "EX" 1-11 and an "Index" that is not an index but a compilation of documents. Many of the documents are Plaintiff's own statement in various formats. Plaintiff cannot create a genuine issue of fact by presenting his subjective opinions as purported evidence of pretext. {C}onclusory allegations of discrimination where {an employer} has offered ...extensive evidence of legitimate non-discriminatory reasons for its actions." Young v. General Foods Corp., 840 F.2d 825, 830 (11th Cir 1988)(citing Grigsby v. Reynolds Metals, Co., 821 F.2d 590, 597 (11th Cir 1987)).

At the March 21, 2003, hearing, this court gave Plaintiff ample opportunity to show the court any admissible evidence in support of his arguments. The court asked Plaintiff to show evidence in support of his arguments that he was discriminated against, and Plaintiff to show evidence in support of his arguments that he was discriminated against, and Plaintiff informed the court that he did not have evidence, but that he had certain individuals "picked down as witnesses." The court then informed Plaintiff that merely having individuals listed as witnesses and failing to submit proper affidavits is insufficient under the Federal Rules of Civil Procedure to respond to a motion for summary judgment.

The primary concern of this court is that all litigants receive equal justice under the law. Plaintiff's status as *pro se* or represented by admitted attorneys, must abide by the rules of this court and the Federal Rules of Civil Procedure. Thus, this court finds that Plaintiff failed to show by any proper evidence that Defendant's reasons for removing Plaintiff from federal service were pretext for unlawful discrimination.

Because this court finds that Plaintiff has not, through admissible evidence, shown pretext, this court hereby GRANTS Defendant's Motion For Summary Judgment (Doc. 27-2).

Conclusion

This court, having considered the briefs and evidentiary submissions and having heard oral arguments in open court on this motion, finds that Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. 27) is hereby GRANTED as to all claims Plaintiff raised in this action. This action and all of Plaintiff's claims are hereby DISMISSED WITH PREJUDICED, with each party to bear

his own costs. A separate order that summarizes the decisions of this memorandum opinion has been filed simultaneously with the clerk of court.

DONE and ORDERED this 8th day of August, 2003.

/s/ KARON O. BOWDRE
KARON O. BOWDRE
United States District Judge

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington ,D.C. 20036

John E. Corbett
Complainant,
v.
William S. Cohen,
Secretary,
Department of Defense,
(Defense Intelligence Agency)
Agency.

Appeal No. 01983071
Agency No.ATL-95-AR-0084E

DECISION

Complainant timely initiated an appeal from a final agency decision (FAD) concerning his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII) as amended, 42U.S.C. § 2000e et seq [1]

[1] On November 9,1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at 29 C.F.R. Part 1614 in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at www.eeoc.gov.

Complainant alleged that he was discriminated against on the bases of race(Black), sex (male) and in retaliation for prior EEO activity when the agency : (1) assigned him the work of another employee; (2) informed him that he would not

receive any future promotions; (3) reprimanded him for remarks he made about his supervisors; (4) reprimanded him for refusing to perform a task; (5) issued him a written discipline for making continuous errors on data request forms; (6) reprimanded him for improper use of government mail; (7) issued him a three- day suspension for unauthorized use of government mail; (8) refuse to give him guidance or direction about his work; and (9) removed him from his position. The appeal is accepted pursuant to 29 C.F.R. § 1614.405

BACKGROUND

The record reveals that during the revelant time, complainant was employed as an Intelligence Research Specialist at the agency's Missile and Space Intelligence Center, Redstone Arsenal, Alabama.

Believing that the agency had committed unlawful discrimination as referenced above, complainant sought EEO counseling and subsequently filed formal complaints on January 30,1997 , and September 28, 1997.[sic, The year was 1987]. At the conclusion of the investigations of the complaints, complainant was informed of his right to request a hearing before an EEOC Administrative Judge or alternatively, to receive a final decision by the agency. Complainant requested that the agency issue a final decision. In its FAD, the agency concluded that complainant failed to establish a prima facie case of race or sex discrimination because he failed to demonstrate that similarly situated employees not in his protected classes were treated differently under similar circumstances to the above-cited disciplinary and performance actions. The agency also concluded that complainant failed establish a prima facie case of retaliation because while the evidence indicated that management was aware of complainant's prior EEO activity,

there was no sufficient nexus between management's actions and the prior activity. Notwithstanding its prima facie findings, the agency concluded that the investigation report set forth management's articulated legitimate nondiscriminatory reasons for its actions, and that complainant did not establish that more likely than not , those reasons were a pretext to mask unlawful discrimination or retaliation.

On appeal, complainant provides arguments attacking the credibility of the articulated reasons provided by management in the investigation file. In response, the agency restates the conclusions provided in its decision that we affirm its FAD.

ANALYSIS

Applying the standards set forth in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973) and Hochstadt v. Worchester Foundation for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), affd, 545 F. 2d 222 (1st Cir, 1976) (applying McDonnell Douglas to retaliation cases) the Commission agrees with the agency that even assuming complainant established prima facie cases of race, sex and retaliation discrimination, he failed to present sufficient credible evidence that more likely than not, the agency's articulated reasons for its actions were a pretext for discrimination or retaliation. In reaching this conclusion, we note that other than complainant's bare assertions of discrimination, the record does not demonstrate that his race , sex or prior EEO activity motivated any of the actions in question . [2]

[2] We note that complainant did present affidavits from individuals implying that discrimination routinely occurred at the facility. however, those individuals failed to lend support to complainant's

contention that race, sex or retaliation were factors in the heart of this matter.

The record provides clear indication of conflict between complainant and his supervisors, but it does not provide evidence of discriminatory animus or disparate treatment. Unless complainant proves that he was discriminated against because of one of his protected bases, he cannot succeed in his EEO claim. See Jackson v. City of Killen, 654 F. 2d 1181, 1186 (5th Cir. 1981) (Title VII is not a shield against harsh treatment at the workplace"). Therefore, after a careful review of the record, including complainant's contentions on appeal, the agency's response, and arguments and evidence not specifically addressed in this decision, we AFFIRM the FAD.

FOR THE COMMISSION:

/s/ Carlton M. Hadden
Carlton M. Hadden, Director
Office of Federal Operations

January 19, 2001
Date

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

John E. Corbett	)	
Appellant	)	Appeal No. 01934622
v.	)	Agency No. 87-03-0092
Togo D. West, Jr.,	)	
Secretary, Department of the Army	)	
Agency.	)	

DECISION

INTRODUCTION

On September 7, 1993, John E. Corbett (appellant) timely filed an appeal with the Equal Employment Opportunity Commission (Commission) from the final decision of the Secretary, Department of the Army (agency), received on September 3, 1993. Appellant alleged discrimination based on race(black) and sex (male), in violation of the Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. C. Section 2000e et seq. The appeal is accepted by the Commission in accordance with the provisions of EEOC Order NO. 960.001.

ISSUE PRESENTED

The issue presented herein is whether the agency conducted a "complete an fair investigation" of certain allegations in accordance with 29 C.F.R. § 1613.216 (a).

CONTENTIONS ON APPEAL

On appeal, appellant make several contentions that shall be considered herein. The agency has offered no comments in response.

BACKGROUND

Appellant initially contacted an EEO counselor in October .1986, and filed his first formal complaint (Complaint-1) on January 15, 1987, alleging discrimination based on race (Black) and sex (male) with regard to three issues. Thereafter, the agency issued a final decision (FAD-1) in which it rejected appellant's complaint based on untimeliness. Appellant appealed this dismissal to the Commission, and we determined that the agency had failed to comply with its obligation to assist appellant in the clarification and articulation of issues. Corbett v. Dept. of the Army, EEOC Appeal No.01821264 (July 8, 1987). Specifically, we noted that although appellant attempted to raise certain disciplinary actions with the EEO counselor, these were not subsequently raised in Complaint-1. We also determined that appellant appeared to be alleging a continuing violation. for these reasons, we remanded the complaint so that the agency could assist appellant in the full articulation of his allegations, and so that it could determine whether appellant had alleged a continuing violation. Thereafter, the agency provided appellant with additional EEO counseling, but determined that , because appellant had opted to file grievances with regard to three disciplinary actions, there were no continuing violation.

Appellant contacted an EEO counselor in September 1987 and again attempted to raise adverse actions taken against him by the agency, including his removal in December 1986.

However, the counselor's report indicates that these issues were not counseled because they either did not fall within the 30 day time period or had been addressed in the grievance process. Thereafter, appellant filed his second formal complaint(Complaint-2) on September 28, 1987, in which he alleged that he had been discriminated against when there was a delay in obtaining EEO counseling, and when the counselor failed to cover areas surrounding the adverse actions he had raised. The agency accepted Complaint –2 for investigation, and thereafter investigated the issues (Issues 1-5) raised in Complaints 1 and 2. These included whether appellant was discriminated when : (1) he was held accountable for errors not reported to him; (2) other employees were allowed to correct his work without his knowledge;(3) he was not informed about the specific duties of his position ; (4) he was not informed about the major elements of his performance appraisal; and (5) Complaint-1 was not properly processed. Following this investigation, the agency issued a proposed disposition finding no discrimination, and appellant requested an EEO administrative hearing. Appellant subsequently with this request , and the agency issued a final decision (FAD-2) finding no discrimination with regard to Issues 1-5. We initially affirmed FAD-2 Corbett v. Dept. of the Army, EEOC Request No. 01913590, (January 31, 1992), and appellant filed a request for reconsideration, arguing that, inter alia, the EEO counselor had not addressed his prior discipline and had not accepted his termination as an issue. Appellant also submitted a document entitled "Statement of Experiences," which documented nine incidents (Allegations 1-9) occurring between July 1985 and December 1986, including: (1) beginning in July 1985, [he] began being assigned the work of a clerical employee who had left the the agency in addition to his own work; (2) in January 1986, [he] was told by his supervisor that he would not be

promoted to a higher grade level; (3) after he told a senior employee to put a clerical task in writing, he received a letter of reprimand in January 1986; (4) after a confrontation on or about January 1, 1986, appellant received a "DF" (identity of acronym not apparent) admonishing him not to make certain remarks to his supervisors or to a senior employee; (5) in March 1986, he received a "DF" stating that he was making continuous errors in a form used for data requests to the National Security Agency; (6) when he tried to defend himself by writing a letter indicating that he had not been informed of the alleged errors, he was reprimanded for mailing his letter through the government mails; (7) on October 9, 1986, he was given a three-day suspension by his supervisor ; (8) he was never given guidance or direction about his work by his supervisor after he confronted him in early 1986; and on December 11, 1986, he received a "DF" from his supervisor proposing his removal from Federal service. Appellant subsequently filed a request for reconsideration of this decision, which we granted. Corbett v. Department of Army, EEOC Request No. 05920407 (July 16, 1992).

In granting appellant's request for reconsideration, we concluded that the agency had not complied with our order in EEOC Appeal No. 01871264, to the extent the agency had ignored appellant's repeated attempts at raising a continuous violation. We also noted that, although the agency had indicated that appellant was precluded from raising certain disciplinary acts because he filed grievances on these matters, the agency had provided nothing which supported this conclusion. For these reasons, we directed the agency to determine whether Issue 1-5 and Allegations 1-9 constituted a continuous violation, and to determine which allegations were acceptable for further processing.

In conjunction with our order, the agency determined that Allegations 1-9 had been treated as a continuous violation in the 1988 investigation to the extent the investigator had addressed them. However, a review of the investigative report indicates that, although the investigator questioned appellant about most of these allegations, they were treated as background information and not as separate issues. The agency also noted that two of these adverse actions set forth in Alllegations 1-9 (3 and 6) had been addressed via the grievance procedure , and that appellant had filed an appeal with the Merit Systems Protection Board with regard to his termination (9). However, a review of the agency's regulations regarding the filing of grievances indicates that employees are not permitted to raise matters of discrimination in the grievance process.[1]

[1]Therefore, the fact that appellant had filed grievances with regard to these allegations would not, pursuant to 29 C.F.R.1613.219, precluded him from raising them in this forum.

Additionally, the record indicates that, while appellant did file an MSPP appeal with regard to his termination, this appeal was dismissed for lack of jurisdiction in June 1987. After the agency had completed its compliance report, it issued a third final decision (FAD-3) on August 23, 1993, finding no discrimination. It issued a third final decision (FAD-3) on August 23, finding no discrimination. It is from this decision that appellant now appeals.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. 1613.216(a), the regulation in effect during the period in question, the agency was required to

thoroughly investiate the matter(s) complained of once the complaint had been accepted. In this case, the agency's position is that , because Allegations 1-9 were addressed during the course of its investigation, this was sufficient to satisfy the requirement of Section 1613.216(a). However, we disagree, and note that merely addressing these allegations as background information is not tantamount to accepting them as issues and investigating them. Therefore , we find that Allegations 1-9, to the extent the agency determined that they constitute a continuing violation, should be remanded for a proper investigation .[2] Accordingly, FAD-3 is vacated and Allegations 1-9 are REMANDED to the agency in accordance with this decision and the applicable regulations.

CONCLUSION

Based upon a review of the record, and for the foregoing reasons, it is the decision of the Commission to vacate the agency's final decision of no discrimination based on race and sex, and to remand Allegations 1-9 for further processing.

ORDER (E1092)

(1) The agency is ORDERED to process remanded Allegations 1-9 in accordance with 29 C.F.R. Section 1614.108. The agency shall acknowledge to appellant that it has received the remanded

[2]Because the MSPB dismissed Allegation 9 based on lack of jurisdiction, appellant was not precluded from raising this allegation in the EEO process. See Weaver v. Dept. of the Navy, EEOC Request No. 05900230 (April 26, 1990).

allegations within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to appellant a copy of the investigative file and shall also notify appellant of the appropriate rights within one hundred fifth (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If appellant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of appellant's request.

A copy of the agency's letter of acknowledgement to appellant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K1092)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant.

FOR THE COMMISSION:

June 24, 1994
DATE

/s/ Ronnie Bluementhal
Ronnie Blumenthal, Director
Office of Federal Operations

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20507

John E. Corbett Appellant, v. Michael P. W. Stone, Secretary, Department of the Army, Agency.	))))))))))
	Request No. 05920407 Appeal No. 01913590 Agency No. 87-03-0092

GRANTING OF REQUEST TO REOPEN
INTRODUCTION

On February 20, 1992, John E. Corbett (hereinafter referred to as appellant) initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reopen and reconsider the decision in John E. Corbett v. Michael P. W. Stone, Secretary, Department of the Army, EEOC Appeal No. 01913590 (January 31, 1992). EEOC regulations provide that the Commission may, in its discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish one or more of the following criteria: 29 C.F.R. §1613.235 (b) (1) (new and material evidence is available that was not readily available when the previous decision was issued); 29 C.F.R. §1613.235 (b) (2) (the previous decision involved an

erroneous interpretation of law or regulation, or a misapplication of established policy); and 29 C.F.R. §1613.235 (b) (3) (the decision is of such exceptional nature as to have effects beyond the actual case at hand). Appellant appears to base his request on 29 C.F.R. §1613.235 (B) (2). For the reasons set forth herein, appellant's request is granted.

ISSUE PRESENTED

The issue presented is whether the previous decision properly affirmed the agency's decision finding that it was not required to address the issue of appellant's termination in his complaint.

BACKGROUND

On October 3, 1986, appellant attempted to contact an EEO Counselor. Appellant did not meet with an EEO Counselor until November 19, 1986, because he had requested a particular EEO Counselor who was unavailable until that date. Appellant received his final interview with the EEO Counselor on January 15, 1987. Appellant then filed a formal EEO complaint dated January 30, 1987, in which he alleged that based on his race (Black) and sex (male): 1) On August 26, 1986, a report that he was responsible for was given to another employee for the correction of errors which he was not informed of; 2) information regarding his actions in allegedly sending incorrect data to the National Security Administration was withheld from him; and 3) he was not informed of or instructed on the major elements of his job performance planning worksheet from January 1, 1986 through December 31, 1986. The EEO Counselor's report, however, indicates that the EEO Counselor's discussions with appellant initially focused on management's

failure to promote appellant and included a "year long chronology of events dealing with job assignments, reprimands, grievances, disciplinary actions, and a host of other problems..."
In a final agency decision dated February 3, 1987 (FAD1), the agency rejected appellant's complaint for failure to contact an EEO counselor in a timely manner. Appellant appealed this decision to the Commission. The appellate decision in EEOC Appeal No. 01871264 (July 8, 1987) found that the agency had failed to comply with its obligation to assist appellant in the clarification and articulation of his allegations during EEO Counseling . Specifically, the decision noted that it appeared that appellant was attempting to raise various disciplinary actions during counseling which he had alleged were discriminatorily taken by his supervisor. The decision also noted that it appeared that appellant might have been raising a continuing violation which would render the first and second allegations of appellant's complaint timely as part of a related series of discriminatory acts by appellant's supervisor against appellant. Based on the foregoing observations, the decision vacated the agency's FAD1 and remanded appellant's complaint to the agency in order to: 1) clarify the time periods involved in appellant's allegation No. 3; 2) assist appellant in full articulation of his allegations, including any allegations involving disciplinary actions taken against appellant by the agency; and 3) determine whether appellant is alleging a continuing violation. The decision further directed that after further clarification, the agency should accept and process appellant's timely allegations and reject any untimely allegations.

The record indicates that appellant was given additional EEO Counseling by the agency on remand. An addendum to the

original EEO Counselor's report indicates that several witnesses were interviewed regarding appellant's allegations and that a reprimand, a three day suspension, and a notice of removal that appellant received from his supervisor were among the subjects discussed. The addendum does not refer to any specific conservations between appellant and the EEO Counselor but states, inter alia, that "Time periods have been clarified...Appellant was assisted with the articulation of allegations...Since each of three incidents was handled independently [sic] through proper channels, there are no allegations for a continuing violation." Addendum p. 5. This addendum also indicates that a Historical summary of events provided by appellant to an agency EEO Specialist on August 20, 1987 was received by the EEO Counselor. [1]

[1] This Historical Summary of events compiled by appellant is not attached to the Addendum of the EEO Counselor's Report found in the record, However, appellant submits a document entitled "Summary of Experiences under the direction of [his supervisor] as an attachment to his current request to reopen and indicates that he submitted it to the EEO Counselor during the intake interview.

An unsigned, untitled record of an apparent discussion with appellant on remand in order to clarify the allegations in his complaint is also contained in the record . This document summarizes events which occurred during appellant's employment beginning in April 1981 when appellant was hired by the agency and culminating with appellant's termination effective January 16,1987. The unnamed author of this summary expressed the opinion that appellant was alleging a continuing violation.

The record also indicates that appellant contacted an EEO Counselor on September 8, 1987 alleging that because of his race (Black) and sex (male) his January 1987 complaint was

mishandled by the agency. The EEO Counselor's Report listed two allegations as follows: 1) An unusually long delay in obtaining an EEO Counselor 3) Oct-19 Nov 86; 2) The EEO Counselor failed to cover areas concerning the adverse actions he had received and failed to speak with some witnesses he had named; and 3) The EEO Office failed to send him a copy of the EEO Counselor's Report. in the subject EEO Counselor's Report regarding appellant's spin off allegation the EEO Counselor noted that appellant had again raised the subject of his previous adverse actions including his removal during counseling, but that the adverse actions were not counseled because they were either not within the requisite 30 day time frame prior to counseling or were the subject of grievances filed by appellant with the agency. Appellant filed a second formal EEO complaint dated September 28, 1987 raising these allegations which was consolidated by the agency as a "spin-off" complaint with appellant's pending complaint for further processing.

In a letter dated November 20, 1987, the agency informed appellant that it had accepted the allegations of [his] complaint as filed" and that the case was being forwarded for investigation. The agency investigating the specific allegations of appellant's complaint that it had previously rejected and the spin-off allegations appellant had raised. [2] After the investigation, the

[2] While appellant's January 30, 1987 complaint only listed three allegations, on remand , the agency characterized allegation No.3 as the following two allegations: 1) that appellant was not informed or provided instruction on duties related to his job; and 2) that appellant was not informed of the major elements of his performance standards.

agency issued a notice of proposed disposition finding no discrimination. While appellant initially requested that an

administrative hearing be convene on his complaint, he withdrew this request. Thereafter, the agency issued a final agency decision (FAD2) finding no discrimination with regard to the following allegations : 1) appellant was held accountable for errors in reports that were not made known to him ; 2) other employees were allowed to correct his work without his knowledge; 3) he was not informed about, nor was he provided instructions on specific duties related to his job; 4) he was not informed of the major elements of his performance standards; and 5) that his complaint was not properly processed. In finding that appellant had failed to prove that his first complaint had been discriminatorily processed, the agency found that the delay in appellant obtaining EEO Counseling was due to his desire to meet with a particular EEO Counselor and that certain matters were not counseled because of untimeliness or because the had been subject of a previous grievance.

Appellant appealed the agency's FAD2 to the Commission. On appeal, appellant asserted that his most important allegation concerning his termination was never accepted by the agency's EEO office. He asserted that he was told by the EEO Counselor that he office could not do anything about the dismissal. He stated that he was also told by the EEO Counselor that all statements taken during the intake interview would be addressed as part of the his complaint and would be investigated. Appellant asserted that the statements he gave to the EEO Counselor addressed specific allegations of mistreatment in the office, disciplinary actions he received, promotions he was denied and his termination from the agency.

The previous decision affirmed the agency's FAD2 finding no discrimination with regard to the five allegations it had addressed. With regard to appellant's allegation that the

agency had improperly failed to address his termination, the previous decision found that the agency was not obligated to address this allegation because it was not contained in appellant's formal complaint or added by appellant in an addendum to that formal complaint or a second formal complaint.

Appellant has filed a request to reopen the previous decision. In his request , appellant, inter alia, again asserts that the EEO Staff Counselor had told him that she could not accept his termination as part of his complaint and that , during the intake interview with the EEO Counselor , she stated to him that the statements he had given to he (His " Summary of Experiences") would also be included in his formal complaint. Appellant also asserts that during the time that initial EEO Counselor was preparing the EEO Counselor's Report, the agency withheld the information that his termination ha been proposed. Finally, appellant alleges that the "adverse actions" which the EEO Counselor had improperly failed to cover were his written reprimand , a three- day suspension, and his termination. Appellant submits several supporting documents with his request to reopen , including a copy of the "Summary of Experiences" relates the following incidents since May 1985, when appellant was first placed under the supervision of the supervisor who ultimately removed him:

1) Beginning in July 1985 , appellant began being assigned the work of e clerical employee who had left the agency in addition to his work;

2) In January 1986, appellant was told by his supervisor that he would not be promoted to a higher grade level

3) After he told a senior employee to put a clerical task he wanted him to do in writing, he received a letter of reprimand in January 1986;

4) After a confrontation on or about January 1, 1986, appellant received a "DF" admonishing him not to make certain remarks to his supervisor or to a senior employee;

5) In March 1986, he received 'DF" stating that he was making continuous errors in completing a form used for data requests to the NSA.

6) When he tried to defend himself by writing a letter indicating that he had not been informed of the alleged errors, he was reprimanded for mailing his letter through the government mails;

7) On October 9, 1986 he was given a three- day suspension by his supervisor;

8) He was never given guidance or direction about his work by his supervisor after he confronted him in early 1986;

9). On December 11, 1986 , he received a "DF" from his supervisor proposing his removal from federal service. Compiled from appellant's "Summary Of Experiences" under the Direction of [his supervisor].

ANALYSIS AND FINDINGS

The Commission may, in its discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that at least one of the criteria of 29 C.F.R. §1613.235 (b) is met. In order for a case to be reopened, the request must cntain specific information which mets the criteria referenced above.

The commission finds that appellant's request meets the criteria required to grant reopening under 29 C.F.R. §1613.235 (b) (2). Specifically, the Commission finds that the previous decision inadvertently did not address the agency's failure to comply with the appellate decision in

EEOC Appeal No. 01871264, which directed the agency: to assist appellant in the articulation of his allegations, including those related to adverse and disciplinary actions; to determine whether appellant was raising a continuing violation; and to, after clarification, accept any timely allegations and reject any untimely allegations.

The record indicates that after the subject remand, the agency allowed appellant to again meet with one of more EEO Counselors, and that at such meeting (s) appellant raised the series of incidents detailed in his "Summary of Experiences." However the allegations as part of a continuing violation, or to specifically reject them for further processing. Instead, the agency allued in its addendum to the EEO Counselor's report and its subsequent FAD2, that the remaining uninvestigated allegations were either untimely or had been pursued by appellant through grievances.

The Commission finds that the agency had clearly failed to comply with the previous decision in EEOC Appeal No. 01871264 and that, as a result, appellant's repeated attempts to raise in the EEO process what appears to a continuing violation including several serious adverse actions have been ignored. Although the agency has alluded that appellant is precluded from raising the matters of the reprimand, 3-day suspension, and the termination in the EEO forum because he has filed grievances on these matter, there is no information in the record from which the Commission could determine that appellant has made an informed election to proceed in that forum or whether he was even required to make such an election in the instant case.[3]

[3]29 C.F.R. §1613.215 (a) (5) of the Commission's regulations allows an agency to reject a complaint that the complainant elects to pursue under a negotiated grievance procedure as identified in 19 C.F.R. §1613.219, which refers only to employees in certain agencies who are

covered by a collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure. The present record does not indicate whether the grievance procedure allegedly utilized by appellant meets the criteria to require such an election. Nor is it clear that, if such an election was required, it was made in an informed manner by appellant.

In any event, the agency has not formally rejected any of the allegations raised by appellant during the clarification counseling which occurred upon remand.

Therefore, in view of the agency's failure to implement the decision in EEOC Appeal No. 01871264, and the prejudice to appellant thereby, the previous decision on the merits of the five allegations raised by appellant was premature.

Based on the above, the Commission vacates the previous decision and the agency's FAD3 which shall determine whether appellant's allegation Nos. 1-9 in the "Summary of Experiences" he provided to the agency EEO Counselor and allegation Nos. 1-5 which have already been accepted by the agency constitute a continuing violation. The agency shall determine, and explain, in its FAD, which of allegation Nos. 1-9 are acceptable for further processing.
In the event that any of these allegations are not acceptable for further processing because of untimeliness or because appellant has elected to pursue them in a grievance forum under 29 C.F.R. §1613.219, then the agency shall specifically reject such allegation(s) in the FAD and provide appellant with appeal rights to the Commission concerning such a rejection. If the agency rejects any of appellant's allegations pursuant to 29 C.F.R. §1613.215 (a) (5), it shall produce documentation which supports such rejection and which proves that appellant made an informed election to

utilize the grievance procedures rather than the EEO process. The agency is directed to hold the processing of appellant's accepted allegations in abeyance until all of the allegations are at the same state of agency processing and to issue a consolidated FAD on the merits of all such accepted allegations, including pending allegation Nos. 1-5.

CONCLUSION

After a review of the appellant's request to reopen, the previous decision, and the entire record, the Commission finds that the appellant's request meets the criteria of 29 C.F.R. §1613.235 (b) (2), and it is the decision of the Commission to grant the appellant's request. The decision in EEOC Appeal No. 1913590(January 31, 1992) and the agency's FAD2 are vacated, and the complaint is remanded to the agency for further processing in accordance with the Order below.

ORDER

The agency is ORDERED to take the following steps on remand:

1) The agency shall determine whether allegation Nos. 1-9 in the "Summary of Experiences" (hereinafter allegation No. SE 1-9) and allegation Nos. 1-5 constitute a continuing violation.

2) The agency shall determine whether allegation Nos. SE 1-9 should be rejected pursuant to 29 C.F.R. § 1613.215 (a) (5).

3) If the agency intends to reject any of appellant's allegation Nos. SE 1-9 pursuant to 29 C.F.R. § 1613.215 (a) (5), then it shall produce documentation which supports such rejection and which proves that appellant made an informed election to proceed through the grievance process.

4) The agency shall determine whether allegation No..SE 1-9 are timely raised

5) The agency shall issue an FAD3 which either accepts or rejects allegation No. SE 1-9 on the foregoing bases.

6) The agency shall hold the processing of previously accepted allegation Nos. 1-5 in abeyance until all accepted allegations are at the same stage of agency processing and then consolidate them with the additional accepted allegations.

7) The agency shall thereafter continue processing all accepted allegations of appellant's complaint pursuant to 29 C.F.R. § 1613.216 et seq.

The agency shall issue the final agency decision discussed above within sixty (60) calendar days of that this decision becomes final. A copy of the letter of acceptance must be submitted to the Compliance Officer, as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION
(KO391)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Officer of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D. C.20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant.

FOR THE COMMISSION

:

7-16-92
Date

/s/ Frances M. Hart
Frances M. Hart